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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

GARY GRAHAM,
Petitioner,

v.

JAMES A. COLLINS, DIRECTOR
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,
Respondent.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

THIS IS A CAPITAL CASE

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QUESTIONS PRESENTED IN MR. GRAHAM'S PETITION FOR WRIT OF CERTIORARI

May a State limit a capital sentencing jury's consideration of a seventeen-year-old defendant's youth, recognized repeatedly by this Court as a powerful mitigating factor, to answering whether he acted "deliberately" and might be dangerous in the future, and afford no other basis for taking his youth into account?

May a State similarly limit the jury's consideration of such a defendant's positive character traits and the unfortunate circumstances of his family background?

TABLE OF CONTENTS

Questions Presented..... i

Table Of Authorities..... iii

Argument in Reply..... 1

Conclusion..... 11

TABLE OF AUTHORITIES

CASES

Ake v. Oklahoma, 470 U.S. 68 (1985) 7

Barnard v. Collins, ___ F.2d ___ (5th Cir. 1992) . . . 6

Boyde v. California, 494 U.S. 370 (1990) 3, 4

Clark v. Collins, ___ F.2d ___ (5th Cir. 1992) . . . 6

Cordova v. Collins, ___ F.2d ___ (5th Cir. 1992) . . . 6

Eddings v. Oklahoma, 455 U.S. 104 (1982) 10

Franklin v. Lynaugh, 487 U.S. 164 (1988) 8

Graham v. Collins, 950 F.2d 1009 (5th Cir. 1992) . . 1, 8

Gregg v. Georgia, 428 U.S. 153 (1976). 10

Griffin v. United States, ___U.S.___, 112 S. Ct. 466 (1991) 10, 11

Lincecum v. Collins, ___ F.2d ___ (5th Cir. 1992) . . 6

Payne v. Tennessee, ___U.S.___, 115 L. Ed. 2d 720 (1991) 4, 5, 8

Penry v. Lynaugh, 492 U.S. 302 (1989) 1, 8

Romero v. Texas, ___U.S.___ , No. A-854 (91-7914) (May 19, 1992) 2

South Carolina v. Gathers, 490 U.S. 805 (1989) . . . 4

Stanford v. Kentucky, 492 U.S. 361 (1989) 10

Tison v. Arizona, 481 U.S. 137 (1987) 9

Wilkerson v. Collins, ___ F.2d ___ (5th Cir. 1992) . 6, 7

STATUTES

Fed. R. Evid. 702 7

Tex. Code Crim. Proc. Art. 37.071 (Vernon's ed. 1992) . 11

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To assist the Court, Petitioner Gary Graham provides this Reply to Respondent's Brief in Opposition.[1]

I.

THE ISSUE PRESENTED BY MR. GRAHAM'S CASE IS SUBSTANTIAL AND RECURRING.

The constitutional question in Mr. Graham's case is central to this Court's sixteen-year effort to develop principles of capital sentencing to permit juries to effect a "reasoned moral response" to the defendant's background and character, as well as to the circumstances of the offense. See, e.g., Penry v. Lynaugh, 492 U.S. 302, 322 (1989). Respondent's contention that "no special or important reason" counsels this Court's exercise

[1] The en banc opinion of the United States Court of Appeals for the Fifth Circuit has been published. Graham v. Collins, 950 F.2d 1009 (5th Cir. 1992) (en banc).

of its certiorari jurisdiction to hear Mr. Graham's case, see Respondent's Brief in Opposition to Petition for Writ of Certiorari (hereinafter Respondent's Brief) at 3, denies the reality of the sharp division in the en banc Fifth Circuit. Only days ago, Justice Stevens acknowledged the substantial character of the question Mr. Graham presents for review, noting the narrow margin by which the Court of Appeals denied him relief. Romero v. Texas, ___U.S.___, No. A-854 (91-7914) (May 19, 1992) (Stevens, J., joined by Blackmun and Kennedy, JJ., dissenting from denial of stay of execution). We showed in the Petition, and show more fully below, why this is so.

II.

THE MAJORITY OPINION IN THE COURT BELOW SUBSTANTIALLY DEPARTS FROM THIS COURT'S SETTLED PRECEDENTS CONCERNING THE CONSIDERATION OF MITIGATING EVIDENCE.

Respondent concedes that the court below circumscribed the mitigating value of Mr. Graham's youth. See Respondent's Brief at 9-12. Respondent characterizes these unprecedented limitations as "recogniz[ing] and appl[ying]" this Court's teaching concerning the Eighth Amendment. Id. at 9. In fact, however, this Court's cases require the opposite result from that reached by the slender majority of the Court of Appeals. Moreover, the Fifth Circuit's application of its Graham rationale in more recent cases reveals its basic incompatibility with Penry, and the need for this Court to provide additional guidance concerning the application of that decision.

A. Respondent's "Nexus" Theory Denies a Central Premise of This Court's Eighth Amendment Work

This Court has rejected the notion that a capital defendant's mitigating evidence must explain or excuse his offense in order to "attain[] constitutional mitigating value relevant to [his] culpability." Respondent's Brief at 9. This misconception, which undergirds the opinion of the Court below and upon which Respondent defends that decision, confuses "culpability" with "causation." Such a limitation on the evidence relevant to a jury's choice between life and death for a convicted defendant, particularly a seventeen-year-old defendant, would be utterly foreign to legal tradition and human experience. This Court has rightly refused to impose such limits.

For example, Boyde v. California, 494 U.S. 370 (1990) disproves Respondent's "nexus" thesis.[2] Boyde upheld the challenged California jury instructions precisely because they did not preclude the jury's consideration of mitigating evidence -- in particular, evidence that was not linked to the commission of the crime:

> Even were the language of the instruction less clear than we think, the context of the proceedings would have led reasonable jurors to believe that evidence of petitioner's background and character could be considered in mitigation. Other factors listed in [the statute] **allow for consideration of mitigating**

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2 Respondent's selective citation of footnotes, see Respondent's Brief at 10, should not distract this Court from the core of the holding in Boyde: the California statute was constitutional because it provided the jury what the former Texas statute did not: a vehicle for considering and giving full effect to **all** mitigating evidence, both crime-related and non-crime-related. Respondent's reliance on Boyde is misplaced.

> **evidence not associated with the crime itself**, such as the absence of prior criminal activity by a defendant, the absence of prior felony convictions, **and youth.** When [the challenged instruction] is viewed together with those instructions, it seems even more improbable that jurors would arrive at an interpretation that precludes consideration of all non-crime-related evidence.

Boyde, 494 U.S. at 383 (emphasis added).[3]

In the same manner, Justice O'Connor's remarks in South Carolina v. Gathers illustrate the Court's consistent definition of mitigating evidence, which countenances no "nexus" limitation:

> Our decisions in Lockett and Eddings were based on the proposition that the decision of the capital sentencer is a profoundly moral one. . . . Evidence extraneous to the crime itself is deemed relevant and indeed, constitutionally so. . . . In this case, the sentencing jury heard testimony from [the defendant's] mother, his sister, and his cousin, all indicating that he was an affectionate and caring person. Gathers' sixth grade teacher testified that he was a quiet and affectionate child. . . . None of this evidence was directly relevant to the events of September 13, 1986, but all of it was relevant to the jury's assessment of the defendant and his moral blameworthiness.

Gathers, 490 U.S. 805, 817 (O'Connor, J., joined by Rehnquist, C.J., and Kennedy, J., dissenting on other grounds) (emphasis added).

Finally, Payne v. Tennessee, ___U.S.___, 115 L.Ed.2d 720 (1991), compels the conclusion that Respondent's "nexus"

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[3] In Boyde, the petitioner had contended that "none of the 11 statutory factors in [the California sentencing statute] allowed the jury to consider non-crime-related factors, such as his background and character, which might provide a basis for a sentence less than death." 494 U.S. at 378. The Court rejected Boyde's claim because it determined that the jury could consider non-crime-related mitigating evidence under the challenged instruction, not because the non-crime-related evidence itself was not constitutionally protected.

argument, and its wholesale adoption by the Court of Appeals below, are fundamentally out of line with this Court's Eighth Amendment cases. Payne upheld the State's presentation of so-called "victim impact" testimony, concerning the "specific harm" suffered by the victim of the crime and her survivors, in large part because "virtually no limits are placed on the relevant mitigating evidence a defendant may introduce concerning his own circumstances." Payne, 115 L.Ed.2d at 733. This Court emphasized that such mitigating evidence "must be received" and considered, even if none of the mitigating evidence is related to the circumstances of the crime. Id.; see also 115 L.Ed.2d at 735-736 (noting that evidence that defendant was "a good son," "extremely polite," and "suffered from a low IQ" was all constitutionally mitigating, despite not being related to the offense).

A limitation on the mitigating significance of youth that constricts it to disproving "future dangerousness," as championed in the lower Court by Respondent, is fatally inconsistent with the principles of Lockett and its progeny. Respondent urges this Court to allow States to limit the kind and quantum of mitigating evidence that may be considered by a sentencer in reaching its decision whether a defendant will live or die. Specifically, Respondent wants to deny -- and concedes that the en banc majority opinion can be read to deny -- the jury the power to give youth any positive or affirmative significance in its decision. Such a principle, which admits of no meaningful

limitation, could transform the punishment phase into a truncated, pro forma inquiry, effectively abandoning the system of bifurcated trials which this Court has relied upon to ensure individualized sentencing in capital cases. The issuance of such a ground-breaking precedent alone is reason for this Court's plenary review.

B. The Court of Appeals' Majority Retreated from Penry

The narrow en banc majority below represents a substantial challenge to this Court's Eighth Amendment capital punishment jurisprudence. Fifth Circuit panels, in stated reliance on the Graham interpretation of Penry, have further narrowed the range of evidence and issues to be considered in mitigation at the punishment phase of a Texas capital trial.[4] These panels have further held that a potential mitigation issue is not Penry/Graham problematic unless it can be and is supported by

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4 See Lincecum v. Collins, ___ F.2d ___ (5th Cir. 1992) (evidence of mother's abandonment of defendant as a child, coupled with testimony regarding defendant's emotionally disturbed state at time of crime, not Penry problematic); Barnard v. Collins, ___ F.2d ___ (5th Cir. 1992) (evidence of severe head injuries only months before the crime, resulting in need for psychiatric help and loss of work; evidence of intoxication at the time of the offense; and evidence of a troubled childhood not Penry problematic); Cordova v. Collins ___ F.2d ___ (5th Cir. 1992) (evidence that defendant was "drinking heavily" at the time of the offense, drank frequently, and "act[ed] crazy" when drunk, "not the kind of uniquely severe permanent handicap" requiring additional jury instructions under Penry); Clark v. Collins, ___ F.2d ___, (5th Cir. 1992) (adopting district court opinion that evidence of alcoholism and remorse not problematic under Penry); Wilkerson v. Collins, ___ F.2d ___ (5th Cir. 1992) (evidence of youth [age 19] not problematic under Penry, citing Graham).

expert testimony.[5] All concede that expert testimony is often important and sometimes essential - in any phase of any criminal trial.[6] However, it turns law and reason on their heads to make the availability of such evidence, designed to "assist the trier of fact,"[7] into a precondition to jury consideration of an issue. A moment's reflection would show that such a rule could have seriously undesirable consequences in civil as well as criminal litigation. Moreover, at the level of constitutional analysis, such a precondition directly affronts the consistent course of this Court's Eighth Amendment teaching about the scope of mitigation evidence in capital cases. See Sec. II (A), supra.

These Fifth Circuit cases suggest that, in the absence of further guidance from this Court, Graham may well obliterate Penry. Perhaps more significantly, these cases show the Fifth Circuit continuing to narrow the scope of evidence a sentencing

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5 In Barnard, for example, although family members had testified to dramatic changes in temperament experienced by the defendant, in addition to describing the severe head injuries he suffered not long before the crime, the Court of Appeals discounted the evidence: "Barnard cannot rely on his mother's inexpert speculation concerning [his] mental condition to demonstrate a Penry-type disability." Barnard, ___ F.2d at ___ (slip op. at 9) (accord Lincecum, ___ F.2d at ___ ("inexpert opinion" testimony does not implicate Penry). Although this particular limitation does not originate in Graham, it well illustrates the reach of Graham's basic premise, and the threat posed by that premise to the regime of individualized sentencing introduced in Woodson, established in Lockett, and reaffirmed in Penry.

6 See, e.g., Ake v. Oklahoma, 470 U.S. 68 (1985) (due process requires defendant have access to expert assistance where defendant's sanity will likely be a significant issue at trial).

7 See Fed. R. Evid. 702.

jury must or may have when choosing between life and death. See Payne, 115 L.Ed.2d at 732 (noting that "an inquiry broad in scope, largely unlimited as to the kind of information [considered] or the source from which it may come," has traditionally been appropriate in criminal sentencing, especially in capital cases) (citations omitted).

The lower court also departed from this Court's established Eighth Amendment principles, and from Penry in particular, in adopting the diluted standard that the former Texas special issues are constitutional if they 'substantially' allow for the consideration of the 'principal mitigating thrust' of evidence. Graham, 950 F.2d at 1027. This assertion, by operation, would overrule this Court's explicit reservation that the Texas special issues are not constitutionally 'adequate' unless they function "in a way that ... clearly direct[s] the jury to consider fully ... mitigating evidence as it bears on [the defendant's] personal culpability," Penry, 492 U.S. at 322. See also Franklin v. Lynaugh 487 U.S. 164, 184 (O'Connor, J., concurring).

Finally, the Court of Appeals ignored Penry in determining that the mitigating value of evidence may be further limited by requiring it to function only in negation of the two former Texas special issues unless it had relevance "substantially" beyond their scope.[8] Respondent urges this Court to endorse this

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[8] While the Court of Appeals does not attempt to quantify its use of "substantially," it is instructive to note that none of the cases reviewed by that Court since Graham (see text, supra) has satisfied this test, despite the wide range of mitigating circumstances they have presented.

additional constriction of the mitigating value of evidence, arguing that the State may relegate all mitigating evidence to the narrow role of "rais[ing] a reasonable doubt as to the special issues." Brief in Opposition at 12. This proposition is precisely the one rejected in Penry. Penry recognizes that some mitigating evidence (there, evidence of child abuse and mental retardation) may not raise any reasonable doubt in relation to the former Texas special issue questions, yet may reasonably move a juror to conclude that a sentence less than death is warranted. The very flaw identified by this Court was the unconstitutional shoehorning of all mitigation into the role of negating the aggravating special issues. Respondent's attempt to harmonize the opinion of the en banc majority below with this Court's reasoning in Penry strikes a sour note.

C. Jury Discretion, Life and Death

At bottom, this case concerns what juries may be told, and must be told, at the sentencing phase of a capital trial. As Judge Higginbotham recognized in his dissent below, it is not possible -- even if it were desirable -- to eliminate jury discretion. Some of this Court's decisions have considered the limits imposed by the Eighth Amendment on jury discretion, as by limiting the offenses for which the death penalty may be imposed. See, e.g., Tison v. Arizona, 481 U.S. 137 (1987). Mr. Graham's case presents an equally important aspect of this Court's Eighth Amendment work: ensuring that the jury has sufficient latitude

to assess life rather than death when the evidence demands it, by spelling out the legal rules that govern jury discretion.

Mr. Graham's Petition shows the consensus among Justices of this Court on the core issue: the relevance of youth to the sentencing decision in a capital case. See Gregg v. Georgia, 428 U.S. 153, 197 (Stewart, J., joined by Powell and Stevens, JJ., announcing the opinion of the Court); Eddings v. Oklahoma, 455 U.S. 104, 118 (1982) (O'Connor, J., concurring); Stanford v. Kentucky, 492 U.S. 361, 375 (1989). Given that consensus, Respondent's Brief (like the narrow majority opinion it defends) fails to shoulder the burden of instructing a capital jury in such a manner that it may give effect to that evidence in imposing sentence. A convicted capital defendant is entitled not only to present evidence, but also to have the jury told what it may do with the evidence, and how. In Mr. Graham's case, the statutorily-mandated jury instructions affirmatively narrowed the jury's consideration of mitigating evidence that every member of this Court would acknowledge as relevant to sentence.

This Court has taught us that "jurors are well-equipped to analyze the evidence," Griffin v. United States, ___ U.S.___, 112 S.Ct. 466, 474 (1991). This observation reflects the fact that jurors in a capital case will be moved by the evidence for and against death, and will apply their wealth of human experience to understanding and assessing it. At the same time, however, this Court has cautioned that "when ... jurors have been left the option of relying upon a legally inadequate theory, there is no

reason to think that their own intelligence and expertise will save them from that error." Id. In precisely the same fashion, a juror in this case might well have concluded that Mr. Graham's youth could not be considered at all, much less that he could "weigh" Mr. Graham's youth against the evidence in aggravation and decide whether a death sentence were warranted. The resulting effect -- that a juror might feel compelled to vote "yes" to the special issues, resulting in a death verdict, despite the existence of facts calling for a lesser sentence, is the evil Penry was intended to correct. This Court should not ignore the fact, as Mr. Graham pointed out in his Petition, that Texas has recently repaired its capital sentencing statute to mend this precise flaw.[9] The majority of the court below, clinging to an incomplete understanding of an antiquated statute, repeats the errors of the past.

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[9] The new Texas statute retains the "special issue" format, with one important difference: if the jury answers the "aggravating" special issues affirmatively, it must then answer

> Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's charcter and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed.

Tex. Code Crim. Proc. Art. 37.071, § 2 (b) (1), § 2 (b) (2), § 2 (e) (Vernon's ed. 1992). The new statute defines "mitigating evidence" as "evidence that a juror might regard as reducing the defendant's moral blameworthiness." Id., § 2 (f) (4).

CONCLUSION

Judge Higginbotham and the other dissenters below accurately portray the sentencer's constitutional function and prerogative at the penalty phase of a bifurcated capital trial. What the Eighth Amendment requires is unlimited access to relevant sentencing information and a way for the jury to give that information meaningful effect in the form of an appropriate sentence. The narrow en banc misapprehends the quality of mitigating evidence and the jury's role at sentencing; its opinion will intolerably diminish accuracy and reliability in capital sentencing. Petitioner Gary Graham thus respectfully prays that this Court grant the writ to review the judgment of the en banc United States Court of Appeals for the Fifth Circuit in his case, and reverse his sentence of death.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Reply to Respondent's Brief in Opposition to Petition for Writ of Certiorari was served on counsel for Respondent by placing same into the U.S. Mail, first-class postage prepaid, addressed to: Enforcement Division, Office of the Attorney General, Price Daniel Sr. Bldg., Austin, Texas, 78711, this 21st day of May, 1992. I further certify that all parties required to be served have been served.

Michael E. Tigar
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May 21, 1992

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Re: **Graham v. Collins, No. 91-7580**

VIA FEDERAL EXPRESS

Dear Sir/Madam,

Enclosed for immediate filing please find enclosed one original and one copy of Mr. Graham's **Reply to Respondent's Brief in Opposition to Petition for Writ of Certiorari.**

If you have any questions, please do not hesitate to call.

Sincerely,

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